

September 22, 2016

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: In the Matter of Expanding Consumers' Video Navigation Choices, Commercial Availability of Navigation Devices, MB Docket No. 16-42, CS Docket No. 97-80

Dear Ms. Dortch:

On September 21st, John Bergmayer, Ryan Clough, and Gene Kimmelman of Public Knowledge (PK) spoke by phone with Gigi Sohn of Chairman Wheeler's office with respect to the above-captioned proceeding.

PK discussed how an apps approach that was truly open and non-discriminatory could benefit consumers. PK stressed that, to be a real competitive option for consumers, MVPD-provided apps must have the same video programming (both linear, and paid and free on-demand) and video-related features (such as DVR, or live pausing) that MVPDs make available on their own devices.

However, it is possible that a device or platform vendor, rather than an app developer, can stand in the way of the app developer reaching consumers via a particular device. PK is well aware of the challenges that platform providers can pose for some developers.¹ A platform vendor might require that an app developer share revenue with it, or use a particular payment system. In such a situation an MVPD could provide to that particular platform a more limited "consumption-only" app that provided access only to linear and free on-demand features, but did not provide in-app financial transactions. MVPDs should be encouraged to negotiate with platform vendors to provide full parity of content and features to consumers on as many devices as possible but the FCC's rules should not hold them at fault for issues beyond their control.

That being said, any deviations from parity should be strictly limited. Platforms that do not put barriers in the way of MVPDs offering fully-featured apps should have those fully-featured apps. Thus PK agrees with Amazon that its proposal that "large MVPDs . . . provide, at a minimum, a consumption-only application to widely distributed systems within one year of the final Order, under the common, transparent, and well-understood practices of appstores"² is only appropriate when "MVPDs ... are unable to reach agreement with a

¹ John Bergmayer, *Apple's In-App Purchase Policies Should Put Customers First*, Public Knowledge (August 25, 2016), <https://www.publicknowledge.org/news-blog/blogs/apples-in-app-purchase-policy-should-put-customers-first>,

² See Letter from Gerard J. Waldron, Counsel for Amazon, Inc., to Marlene H. Dortch, FCC, MB Docket No. 16-42 (filed Sep. 12, 2016) ("Amazon Sep. 12, 2016 *Ex Parte*").

device maker on in-app transactions.”³ This may happen, for instance, in circumstances with platforms, such as Amazon’s own FireOS and Fire TV, or Apple’s iOS and tvOS app stores, that may enforce in-app payment rules.⁴

The Commission must be cautious in its approach because stepping back from complete parity could undermine the entire competitive proposition. A consumer should not be forced to choose between a cable set-top box and an app that offers less content and fewer features. Additionally, creating different categories of video programming could create an incentive for MVPDs to shift programming (e.g. from linear to on-demand) to evade competitive device support. Furthermore, while some platforms might provide customers with other transactional video-on-demand options, the same might not be true of other platforms, and the users of those platforms should not be denied access to the complete range of MVPD services on the devices of their choice.

The Commission must ensure that its rules are broadly applicable to many kinds of devices and platforms, including platforms that lack app store “standard practices and guidelines.”⁵ The Commission could therefore consider as an alternative to the licensing regime the Commission contemplates for MVPD-supplied apps, a certification regime where both competitive device manufacturers and MVPDs mutually and reciprocally certify compliance with a checklist of competition, security and privacy-related criteria. (See Attachment [A] for a full description of the mutual certifications.)

Such an approach relies on “well-functioning market solutions—and not a government supervised industry [or licensing] committee,”⁶ and it preserves compliance to the critical criteria established as necessary by MVPDs and device manufacturers throughout this proceeding to protect content and the ability to provide competitive and innovative consumer electronics devices. Device manufacturers would certify that their device will comply with the preservation of channel line-ups, privacy protections, advertising protections, consumer protections as described in the original NPRM, and security. Once a device manufacturer certifies compliance with these terms, the widely deployed platform will permit the device to receive and provide access to an MVPD-supplied app. At the same time, pay-TV providers will certify that they will comply with the following requirements as they license the app for linear and VOD programming to widely-deployed platforms: parity of content and performance, parity of features, nondiscrimination, anticompetitive conduct, universal search, and technical support for the app. To ensure compliance with this checklist, the Commission could develop enforcement provisions that would allow it to

³ See Letter from Gerard J. Waldron, Counsel for Amazon, Inc., to Marlene H. Dortch, FCC, MB Docket No. 16-42 (filed Sep. 21, 2016) (“Amazon Sep. 21, 2016 *Ex Parte*”)

⁴ Not all app stores that use in-app purchases systems categorize require that all media purchases use in-app purchase systems. For example, Google has an exception to its in-app purchase rules for “digital content that may be consumed outside of the app itself (e.g. songs that can be played on other music players).” Google Developer Policy Center, Payments, <https://play.google.com/about/monetization-ads>. Transactional VOD may or may not meet this criterion.

⁵ See Amazon Sep. 21, 2016 *Ex Parte* at 1. While PK does not object to MVPDs submitting apps to platforms via app stores, the certification checklist described herein would assure that the MVPD apps were compliant with the Commission’s rules.

⁶ See Amazon Sep. 12, 2016 *Ex Parte* at 2.

review complaints in order to resolve disputes or allegations of noncompliance with these checklist items, and it could do so through an expeditious process.

By allowing device manufacturers and MVPDs to require reciprocal certification, the Commission can ensure enforceable compliance with reasonable requirements, consumer expectations and protections, and the objectives and requirements of Section 629, including the availability of MVPD apps for competitive devices.

Respectfully submitted,

/s/ John Bergmayer

Senior Staff Attorney
Public Knowledge
1818 N. St., NW
Suite 410
Washington, D.C. 20036
(202) 861-0020